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IN THE SUPREME COURT OF THE UNITED STATES

JOHNNY PAUL PENRY
Petitioner
v.
GARY L. JOHNSON
Director, Texas Department of Criminal Justice,
Institutional Division
Respondent

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF AMICUS CURIAE OF THE BAR HUMAN RIGHTS COMMITTEE OF ENGLAND AND WALES AND "AMICUS" IN SUPPORT OF THE PETITIONER

TO BE REPRINTED

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Interest of Amicus Curiae

The Bar Human Rights Committee is the international human rights arm of the Bar of England and Wales. The Committee regularly appears in cases where there are matters of human rights concern, and has experience of legal systems throughout the world. The BHRC has previously appeared as *Amicus Curiae* before the United States Supreme Court.

"Amicus" is a United Kingdom Charity, which aims to train lawyers in the United Kingdom to provide assistance for United States death penalty attorneys by undertaking internships, in the provision of briefs of *Amicus Curiae*, preparing clemency petitions, undertaking research and making applications to the Inter American Commission of Human Rights. "Amicus" runs an educational programme which has included senior judges, academics and practitioners from the US and around the world. "Amicus" has also previously appeared as *Amicus Curiae* before the United States Supreme Court.

The Bar Human Rights Committee of England and Wales and "Amicus" submit this *Amicus Curiae* brief in support of the Petitioner Johnny Paul Penry in seeking a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, reversing the judgement of that court denying the petitioner a certificate of appealability.

Summary of Argument

The Common Law has always prevented the execution of those suffering from mental illness, a prohibition which has been followed in the United States. The reasons given for not allowing such executions are essentially summarised in the suggestion that it is against common humanity to allow the execution of someone who cannot fully comprehend the nature of their crime and the finality of the punishment. In other Common Law jurisdictions, the law developed to prevent the execution of those suffering from severe mental retardation, short of illness. In the United States, many of the States have similarly introduced legislation preventing such executions, reflecting that development in the law.

Someone with severe mental retardation has the functional ability of a juvenile. Every other common law jurisdiction around the world has prohibited the execution of juveniles. To execute someone with the intellectual development of a 7 year old would be the same as executing someone who was actually 7 years old. Evolving standards of decency would suggest that such executions are no longer permitted.

Furthermore, for someone with mental retardation to remain on death row for over 20 years awaiting punishment has similarly been held around the world to amount to inhumane treatment.

International Law, both through International Treaties and Customary International Law, has reflected these standards which are applied in every other civilised country in the world, and has evolved so as to prohibit the lawful homicide of both juveniles and the mentally retarded, and

those held for years on death row. The United States is bound by this law, and it should be applied.

If the execution of the mentally retarded is to be permitted, then the jury must be allowed to consider all these factors in considering sentence.

1. The common law, the practice of other nations, and international law are proper considerations with which to assess evolving standards of decency.

To ascertain the meaning of the constitutional bar on cruel and inhuman punishment, it is permissible to look to other jurisdictions. "'There is no doubt' that Section 10 of the English Bill of Rights of 1689 'is the antecedent' of the cruel and unusual punishment clause of our Eighth Amendment."[1] The historical evolution of common law is a factor that can be used to assist the Court: *Ford v. Wainwright*, 477 U.S. 399, 406 (1986). The influence of the international custom of Western European countries, countries with an Anglo-American culture and human rights treaties, have all been recognised as of significance. *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988). The Supreme Court has held that the practice in other "civilized nations of the world" is a relevant consideration, *Trop v. Dulles*, 356 U.S. 86 (1958), as are standards under international law, *Enmund v. Florida*, 458 U.S. 782 (1982), in deciding what amounts to "cruel and unusual punishment." Similarly, "[T]he customary law of human rights is part of the law of the United States to be applied as such by state as well as federal courts." Restatement (Third) of Foreign Relations Law of the United States, § 702, comment c.

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[1] *McKenzie v. Day*, 57 F.3d 1461, 1487 n.18 (9th Cir. 1995) (Norris, J., dissenting), citing *Harmelin v. Michigan*, 501 U.S. 957, 966 (1991) (Scalia, J., concurring).

These concepts should therefore be used in order to assist the Court in deciding whether executing a mentally retarded man with the intelligence of a 7 year old after 20 years on death row amounts to cruel and unusual punishment:

> "[T]he basic concept underlying the [Eighth Amendment prohibition of cruel and unusual punishment] is nothing less than the dignity of man. While the state has power to punish, the [clause] stands to assure that this power be exercised within the limits of civilized standards," and recognizes the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958).

Similar concepts exist in the other common law jurisdictions. In the case of *Fisher v. Minister of Public Safety and Immigration (No. 1)*, [1998] A.C. 673, at 686, Lord Steyn commented that:

> "The innate capacity of different areas of law to develop varies. Thus the law of conveyancing is singularly impervious to change. But constitutional law governing the unnecessary and avoidable prolongation of the agony of a man sentenced to die by hanging is at the other extreme. The law governing such cases is in transition."

The European Court of Human Rights refers to the European Convention of Human Rights as being a "living instrument" when considering the prohibition on inhuman or degrading treatment or punishment in Article 3. *Soering v. United Kingdom*, Judgment of 7 July 1989, Series A, No. 161, 11 EHRR 439.

2. The execution of those with serious mental disturbance has always been prevented by the common law.

From earliest times the Common Law prevented the execution of those suffering from mental disturbance. As the lawyer Coke stated, "By intendment of Law the execution of the offender is for example, . . . but so it is not when a mad man is executed, but should be a miserable spectacle, both against Law, and of extream inhumanity and cruelty, and can be no example to others."[2] Similarly, Blackstone stated in the *Commentaries on the Laws of England*, that "Idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities." *Ford v. Wainwright*, 477 U.S. at 406. This interpretation of the law was accepted in that case by the Supreme Court for the following reasons, as stated by Justice Marshall:

> "It is clear that the ancient and humane limitation upon the State's ability to execute its sentences has as firm a hold upon the jurisprudence of today as it had centuries ago in England. The various reasons put forth in support of the common-law restriction have no less logical, moral and practical force than they did when first voiced. For today, no less than before, we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life.... Similarly, the natural abhorrence civilized societies feel at killing

[2] 3rd Institute 6 (6th ed. 1680), cited in *Ford v. Wainwright*, 477 U.S. 399, 407.

> one who has no capacity to come to grips with his own conscience or deity is still vivid today. And the intuition that such an execution simply offends humanity is evidently shared across this nation. Faced with such widespread evidence of a restriction upon sovereign power, this Court is compelled to conclude that the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane. Whether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment." *Id.* at *408.*

In the United Kingdom, the practice developed with regard to those suffering from mental deficiency not actually amounting to a disease, so as not to impose the death penalty upon them. Judges in the eighteenth century could force the King to give mercy by refusing to *pronounce* the death sentence, merely *recording* it. For example, in the trial of Hadfield for attempting to kill King George III in 1800, the great lawyer Erskine successfully persuaded the judge, Lord Kenyon, that suffering from delusions was sufficient to acquit the defendant as insane, even though there was no total deprivation of understanding. *Hadfield's Case*, 27 St. Tr. 1281 (1800). By the nineteenth century in the United Kingdom, the law had developed with the introduction of the rule in *M'Naghtens' Case*, 10 Cl. & F. 200 (1843), which held that where, "at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did no know he was doing what was wrong." By the late

nineteenth century, 21% of defendants had their death sentences reprieved due to insanity, or "mental disturbance." By the early twentieth century this had become one third.[3]

Parliament appointed a Royal Commission on Capital Punishment in 1949: Command Paper 8932. In considering this issue they reported that a "mental defective…is a person who has never possessed a normal degree of intellectual capacity, whereas in an insane person faculties which were originally normal have been impaired by mental disease." Para. 336. Such "mental deficients" included those with IQ's up to 70. The Commission found that "there seems to be no doubt that in practice the M'Naghten Rules have often been so interpreted as to include mental deficiency, at least in cases where the other conditions laid down by the rules are fulfilled." Para. 362. They concluded that:

> "[T]hough some mental defectives can properly be held wholly irresponsible, the majority should rather be regarded as having a diminished responsibility. The diminution of responsibility may in borderline cases be relatively small, but it can never be excluded, and in our opinion it would not ever be right to carry out the sentence of death in any case where a prisoner is certifiable as a mental defective" (para. 385).

In 1954, Derek Bentley was executed for the murder of a policeman. Although he was in police custody at the time the gunman shot, it was found that his words "Let him have it, Chris," amounted to an encouragement of the other person to

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3 *See* Radzinowicz, L. & Hood, R., *The Emergence of Penal Policy, in* 5 A History of English Criminal Law and Its Administration from 1750, at 264-65 (1986).

shoot. "Chris" was only 16 years old and could not be executed. Bentley only had an IQ in the low seventies, "just above the level of a feebleminded person" and a mental age of 11½. *R. v. Home Secretary ex parte Derek Bentley*, [1994] QB 349. The Home Secretary did not commute the sentence, although the trial judge, Lord Chief Justice Goddard, had expected him to do so. There was public outcry when he was executed.

Following the report of the Royal Commission and the case of Derek Bentley, Parliament introduced the Homicide Act 1957, section 2 of which provides that:

> "Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing."

The Royal Commission had concluded that:

> "There can be no doubt that, in the feeble-minded, judgement, moral sense and appreciation of right and wrong are defective, and the power of self-control is substantially less than that of a normal person: and this defect, although it may vary in degree, is liable to be accentuated by such factors as drink or a transient phase of unrest. There may be cases in which these defects of intellect and of self-control are so great as to justify those affected

by them being held wholly irresponsible. On the whole, however, medical witnesses appeared to consider that, save in exceptional cases, the feeble-minded should be regarded as having diminished responsibility rather than as being wholly irresponsible, and we accept this view." Para. 348.

Consequently, the common law in the United Kingdom developed in the mid-twentieth century so as to prevent the execution of those suffering from mental retardation, as it was not thought that such people had complete responsibility for their actions.

3. The execution of the mentally deficient equates with the execution of juveniles, which is prohibited in all other common law countries.

In 1949, The Royal Commission also considered the issue of comparing actual ages with mental ages, hearing evidence that "the feeble-minded [have] a mental age of 6-10½ or 11 years, or an I.Q. of 40-70," para. 338. They considered that:

> "An adult mental defective with a mental age of 9 years differs in important respects from a normal child of 9, notably in sexual and emotional development: and it is just this difference which may lead to the commission of crime. The adult will be in some ways more mature and may have learned a simple trade and be able to earn a living, but he is exposed to much more violent and dangerous temptations.... When the instincts and emotions of an adult are combined with the insight and understanding of a child, it is

> inevitable that the power to control those instincts should be defective, and should on occasions fail altogether, with results sometimes disastrous." At para. 339.

That comment appears particularly apposite in the case of Johnny Paul Penry, where it is clear that the authorities were aware from previous incidents that he had difficulty controlling adult emotions and instincts within the mind of a child.

The European Court of Human Rights has also made the correlation between mental deficiency and youth in the death penalty in the case of *Soering v. United Kingdom*, Judgment of 7 July 1989, Series A, No. 161 at para. 108, 11 E.H.R.R. 439, 509, where it stated that:

> "The youth of the person concerned is a circumstance which is liable, with others, to put in question the compatibility with Article 3 [inhuman or degrading treatment] of measures connected with a death sentence. It is line with the Court's case-law ... to treat disturbed mental health as having the same effect for the application of Article 3."

Historically, the common law always prevented the execution of those too young to fully comprehend their actions. Executions were rarely used against those 16 or younger in the eighteenth century, and the last of a 17 year old in the United Kingdom was that of Joseph Morley in 1887. In this century, there have only been three executions of people aged 18-21, in 1904, 1922 and 1925. The Atkin Committee on Capital Punishment recommended in 1930 that the age below which defendants could not be executed be raised to 21. They referred to the fact that: "[T]he emotional

balance of young people under the age of 21 is unstable, and this instability reduces their responsibility, and that the instability of adolescents, which in some cases may even amount to a form of mental disorder is very often a factor in the crime." Para. 189. Parliament introduced the Children and Young Person's Act in 1933 which raised the age to 18.

The United States has to some extent followed the development of the common law in this way, by preventing the execution of those under 16 at the time of the offence, *Thompson v. Oklahoma*, 487 U.S. 815 (1988), but it is clear that other common law countries have moved further in developing standards of common decency.

4. Detention of a person who is mentally retarded on death row for over 20 years amounts to inhuman punishment according to the common law and international law.

Historically, executions in England followed swiftly after sentence was passed, normally within 4 weeks. By the mid 1950's, the Royal Commission on Capital Punishment reported an average delay as six weeks where there was an appeal, and three weeks if there as not. As an example, in 1947 there was great public outcry following the discovery that certain men convicted of capital murder in the Gold Coast had been on death row for two years. In a debate on the matter in the House of Commons, Mr. Winston Churchill expressed the sentiment of the House when he said: "people ought not to be brought up to execution, or believe that they are to be executed, time after time whether innocent or guilty,

however it may be, whatever their crime. That is a wrong thing."[4]

The situation was the same in the United States at the time of the War of Independence. Delays of years were not known, as Justice Stevens noted in his memorandum, in the case of *Lackey v. Texas*, 514 U.S. 1045 (1995), where there was a delay of 17 years. "Such a delay, if it ever occurred, certainly would have been rare in 1789, and thus the practice of the Framers would not justify a denial of the petitioner's claims."

In the case of *Pratt and another*, cited above, the Judicial Committee of the Privy Council held that holding someone on death row for 14 years amounted to inhuman or degrading punishment in violation of Section 17(1) of the Constitution of Jamaica. The Privy Council stated that:

> "... It is difficult to envisage any circumstances in which in England a condemned man would have been kept in prison for years awaiting execution. But if such a situation had been brought to the attention of the court their Lordships do not doubt that the judges would have stayed the execution to enable the prerogative of mercy to be exercised and the sentence commuted to one of life imprisonment." *At page 19.*

Other common law jurisdictions have decided that delays measured in years are not acceptable. The Supreme Court of Zimbabwe held that being held for between four and six years under sentence of death constituted "inhuman or

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[4] Cited in *Pratt and another v. Attorney General of Jamaica* [1994] 2 A.C. 1, at 18.

degrading punishment."[5] In India, two years delay has been held unconstitutional.[6]

The European Court of Human Rights considered the same issue in 1989 in the case of *Soering v. United Kingdom*. Soering was due to be extradited for a murder to West Virginia, where there was the possibility that he would face the death penalty, with an average wait of 7 to 8 years on death row. *Soering* argued that such treatment was in violation of the prohibition of cruel and degrading punishment in Article 3 of the European Convention of Human Rights. The Court specifically considered youth and mental health issues as a part of the death row phenomenon. It was argued that there were provisions to prevent the arbitrary application of the death penalty. The Court stated that these provisions "do not, however, remove the relevance of age and mental condition in relation to the acceptability, under Article 3, of the "death row phenomenon" for a given individual once condemned to death." (para. 109) One Federal court has referred to the case of *Soering* as being "an important precedent.... It reflects a persuasive though non-binding international standard." *Ahmad v. Wigen*, 726 F. Supp. 389, 414 (E.D.N.Y. 1989).

Clearly, those who are mentally retarded are likely to suffer more during detention than other prisoners. "Mentally retarded persons meet with unremitting hardships in prison." *Ruiz v. Estelle*, 503 F. Supp. 1265, 1344 (S.D. Tex. 1980). Consequently, incarceration on death row in such circumstances makes the case of Johnny Paul Penry different from many other examples of the death row phenomenon.

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[5] *Catholic Commission for Justice & Peace in Zimbabwe v. Attorney-General*, 14 Hum. Rts. L.J. 323 (1993).

[6] *Vatheeswaran v. State of Tamil Nadu*, 2 SCR 348 (1983).

Over a century ago the US Supreme Court recognised that, "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it." *In re Medley*, 134 U.S. 160, 172 (1890). "If the Court accurately described the effect of uncertainty in Medley, which involved a period of four weeks...that description should apply with event greater force in the case of delays that last for many years." *Lackey v. Texas*, 514 U.S. 1045 (1995). In that case, the memorandum of Justice Stevens suggested that with such a novel issue, the lower courts should look into this point in detail. "Petitioner's claim, with its legal complexity and its potential for far-reaching consequences, seems an ideal example of one which would benefit from such further study." *Id.* at 1045.

5. The execution of juveniles or the mentally retarded violates international treaties and customary international law.

International agreements to which the United States is a party are laws of the United States and supreme over the law of the several states. Restatement (Third) of Foreign Relations Law of the United States § 111 (1) (1987). The United States Supreme Court has for a long time held that "[S]tate law must yield when it is inconsistent with or impairs the policy or provision of a treaty or of an international compact or agreement." *United States v. Pink*, 315 U.S. 203, 230-31 (1942).

Through treaty ratification, nations promote the growth of customary international norms. "International agreements create law for the states parties thereto and may lead to the creation of customary international law when such

agreements are intended for adherence by states generally and are in fact widely accepted." Restatement, *supra*, § 102(3).

The prohibition of executions of both juveniles and the mentally retarded has now achieved the status of a Customary Norm of International Law. Under United States law, "[T]he customary law of human rights is part of the law of the United States to be applied as such by state as well as federal courts." Restatement, *supra*, § 111 (1) (1987). For a particular norm to achieve the status of customary international law, two conditions must be met. Firstly, the norm must be reflected in a general practice by nations, and secondly, there must be *opinio juris*.

With regard to treaties, the International Covenant on Civil and Political Rights (ICCPR) was ratified by the USA in 1992. Under Article 6(5) of the ICCPR, those under 18 at the time of an offence may not be sentenced to death. The United States Senate has sought to apply a reservation allowing the execution of juveniles. Article 4(2) of the ICCPR was also ratified, which states that "no derogation from articles 6, 7, ... may be made under this provision." Eleven European signatories of the ICCPR have declared the reservation illegal, and the United Nations Human Rights Committee, which has a United States representative, has stated that the reservation is invalid[7]. Such a reservation made by the Senate violates the doctrine of separation of powers and the Treaty Clause which limits the power to make treaties to the president, and violates the "object and purpose" of the ICCPR itself. Consequently, the reservation is invalid.

[7] *Concluding Observations of the Human Rights Committee: USA*, UN Doc. CCPR/C/79/Add.50, para. 279 (October 3, 1995).

The general practice of nations can be adjudged by the fact that the United States is amongst only a handful of nations which permits the execution of juveniles, as observed by Springer, CJ, dissenting, in *Domingues v. Nevada*: "Under Nevada's interpretation of the treaty, the United States will be joining hands with such countries as Iran, Iraq, Bangladesh, Nigeria and Pakistan in approving death sentences for children." 961 P.2d at 1280-81. According to recent figures, in 1998 only one country actually executed a defendant who was a juvenile at the time of the offence, that country being the United States. Amnesty International, *The Death Penalty Worldwide: Developments in 1998*, ACT 50/04/99 (May 1999). In two other countries where sentences of death were imposed, Singapore and the Democratic Republic of Congo, the sentences were commuted to life imprisonment.

Similarly, no democratic country has been reported as executing a person suffering from mental retardation, save for one unconfirmed report in Japan suggesting "mental illness." Amnesty International Japan, *The Death Penalty: Summary of Concerns*, ASA 22/01/97 (March 1997). The recent report by the Secretary General of the United Nations, *Capital Punishment, and the Implementation of the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty*, UN Doc. V.00-52715(E) (2000), at paragraph 96, indicates that of the States which replied to their enquiries, only Togo stated that their law would permit the execution of both the mentally retarded and the mentally ill. The 41 members of the Council of Europe, which includes Russia and the former communist states of eastern Europe, have *de facto* abolished the death penalty since 11 March 1997.

Opinio Juris has made it clear that the execution of the mentally retarded is not accepted in international law. The United Nations Economic and Social Council made a

resolution in 1989 recommending that states eliminate the death penalty "for persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentence or execution."[8] Similarly, in a recent report, the United Nations Human Rights Committee stated it "regrets that, in some cases, there appears to have been a lack of protection from the death penalty of those mentally retarded."[9] The United Nations Commission on Human Rights adopted a resolution on 27 April 2000, sponsored by the European Union, calling on retentionist countries "not to impose the death penalty on a person suffering from any form of mental disorder or to execute any such person."[10] The UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has stated that international law prohibits the capital punishment of mentally retarded or insane persons, pregnant women and mothers of young children.[11]

International tribunals have found that such executions violate international law. In the case of *Francis v. Jamaica*, Communication No. 606/1994 U.N.H.R.C., on 12 August 1994, the United Nations Human Rights Committee held that the execution of a man suffering from mental anguish, but examined and found not to be insane, together with a delay in death row of over 12 years, amounted in that case to cruel, inhuman or degrading treatment in violation of Article 7 of

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[8] *Resolution of ECOSOC*, 1989/64, adopted 24 May 1989, UN Doc. No. E/1989/INF/7.

[9] Note 8, *supra*, para. 281.

[10] *Resolution of the UN Commission on Human Rights*, adopted 27 April 2000, UN Doc. No. CN.4/RES/2000/65.

[11] *Report by the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Execution*, UN Doc. No. E/CN.4/1994/7 (December 7, 1993).

the ICCPR. Similarly, the European Court of Human Rights in the case of *Soering v United Kingdom*, cited above, held that:

> "Although it is not for this Court to prejudge issues of criminal responsibility and appropriate sentence, the applicant's youth at the time of the offence and his then mental state, on the psychiatric evidence as it stands, are therefore to be taken into consideration as contributory factors tending, in his case, to bring the treatment on death row within the terms of Article 3" *at para. 109.*

Consequently, it is obvious that this Court would have to allow the law of the United States to act in opposition to the rest of the world if Johnny Paul Penry is executed.

6. Where the death penalty for the mentally retarded is retained, the jury should be given sufficient instructions to allow for full consideration of mental retardation as mitigation.

The trial judge's instructions in the instant case created an insoluble dilemma for the jurors. He instructed them that they were to consider mitigating evidence only when answering the special issues questions.

> If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability *at the time you answer the special issue*. If you determine, when giving effect to the mitigating evidence, if any, that a life

> sentence, *as reflected by a negative finding to the issue under consideration*, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, *a negative finding should be given to one of the three special questions*.

This instruction was given despite the fact that much mitigation evidence in Penry's case, e.g. the evidence concerning his brutal treatment as a child, had no relevance to any of the three special issue questions. Thus, in order to consider the mitigation evidence presented, which the jury was told it must do, it had to consider such evidence in a context in which it was completely irrelevant.

In *Boyde v. California*, 494 U.S. 370 (1990), this court decided that if there was a real possibility that a juror might interpret a charge in a way that prevented them giving proper consideration or effect to mitigating evidence, the charge would not pass constitutional muster. In the instant case a reasonable and conscientious juror might well have concluded from the judge's charge and the verdict form that constitutionally relevant mitigating evidence had no relevance to the special issues presented for answer. In such circumstances, such a juror could not both hold to the oath he or she had taken and yet give effect to mitigating evidence if they wished to do. The judge effectively invited the jurors to consider disregarding part of their oath if they found it expedient to do so.

Carrollean logic of such a kind is manifestly unjust and likely to give rise to those 'freakish' or 'arbitrary' impositions of the death penalty that were condemned in *Furman v. Georgia*, 408 U.S. 238 (1972). In the case of a mentally retarded defendant like the petitioner, constitutionally relevant evidence as to his cognitive abilities

goes to the very heart of his culpability. A jury charge that obfuscates the relevance or consideration of such mitigating evidence is a denial of a defendant's entitlement to due process guaranteed by the Fifth and Fourteenth Amendments.

7. Conclusion

In 1989, the Supreme Court stated that "a national consensus against execution of the mentally retarded may someday emerge, reflecting the 'evolving standards of decency that mark the progress of a maturing society.'" *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989). Clearly, there is a strong argument for stating that such a consensus has now emerged, not only amongst the individual states, but amongst the community of democratic nations. This issue, dealing with the fundamental humanity of the nation, should be properly

argued before the Courts. Consequently, counsel for *Amici Curiae* urge the Court to grant the relief sought by the Petitioner.

Respectfully Submitted,



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